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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1903

BEVERLY L. BEELER - - Petitioner-Appellant

versus

UNITED STATES OF AMERICA - Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINION BELOW

Petitioner was convicted of one (1) count of obstruction, by extortion, of articles in commerce, 18 U.S.C. §1951 and one (1) count of bribery of a public official in violation of 18 U.S.C. §201(c)(1) in the United States District Court for the Eastern District of Kentucky at Covington, Kentucky, on March 30, 1979. His conviction was then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed those convictions on May 2, 1980. (Appendix A-1).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered and entered on May 2, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the trial court erred in refusing to dismiss the duplicitious counts of the indictment against the Petitioner and subjecting him to double jeopardy in violation of the United States Constitution.

STATUTES INVOLVED

18 U.S.C. §1951; 18 U.S.C. §201(c)(1); 18 U.S.C. §201(g); 18 U.S.C. §371.

These statutes are set forth in full in the Appendix A-2.

STATEMENT OF THE CASE

On October 11, 1978, Petitioner was indicted for offenses dealing with the alleged taking of or misuse of government funds. A thirteen count indictment was returned charging him specifically with one count of 18 U.S.C. §371, conspiracy to defraud the United States, one count of 18 U.S.C. §1951, obstruction, by extortion, of articles in commerce and eleven counts of 18 U.S.C. §201(c)(1), bribery of a public official. The Hon. Eugene E. Siler, Jr., Judge, United States District Court for the Eastern District of Kentucky,

presided over the trial by jury, which was held on January 15 through January 19, 1979. The jury found the Petitioner not guilty as to Counts One, Two, Four, Five, Eight, Nine, Ten, Eleven, Twelve, and Thirteen of the indictment alleging in Count One of the violations of 18 U.S.C. §371 conspiracy to defraud the United States and nine counts of 18 U.S.C. §201(c)(1). One count of the indictment, Count 6, alleging a violation of 18 U.S.C. §201(c)(1) was dismissed by the Court. The jury was unable to reach a verdict on Counts 2 and 7 of the indictment alleging a violation of 18 U.S.C. §1951, obstruction by extortion of Articles in Commerce and one count of 18 U.S.C. §201(c)(1), bribery of a public official. On February 8, 1979, one Superseding Indictment No. 78-39-S was returned. That Indictment was a three count Indictment alleging in Count One a violation of 18 U.S.C. §201(g), soliciting and receiving property as a public official. The trial on this Indictment was had by a jury in the United States District Court for the Eastern District of Kentucky with the Honorable Eugene E. Siler, Jr., presiding, over a March 26 through March 30, 1979. The jury found the Petitioner guilty of Count One of the Indictment, 18 U.S.C. §1951, obstruction of commerce by extortion and Count Two of the Indictment, 18 U.S.C. §201(c)(1), bribery of a public official and not guilty of Count Three of the Indictment. On March 30, 1979, judgment and commitment was entered ordering the Petitioner to serve 18 months on Count One of the Indictment and 18 months on Count Two of the Indictment, to be served concurrently for a total sentence of 18 months in the penitentiary.

Prior to the beginning of the second trial, Petitioner made a Motion to Dismiss based on the fact that the Petitioner had previously been acquitted on virtually the same offenses and that the Superseding Indictment was in effect a mere rewording of the prior indictment. Thus, the Petitioner was subjected to double jeopardy in violation of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The Trial Court Erred in Refusing to Dismiss the Duplicitous Counts of the Indictment Against the Petitioner and Subjecting Him to Double Jeopardy in Violation of His Constitutional Rights.

As stated in the facts, the Petitioner was initially indicted on October 11, 1978. That Indictment, No. 78-39 was a Thirteen-Count Indictment charging him with taking Newport Housing Authority property and using it for his own personal use. Count One of that Indictment charged the Petitioner with knowingly conspiring with another known person . . . to defraud the United States and an agency and department of the United States, that is, the United States Department of Housing and Urban Development . . . by converting to his own use property of another having value in excess of $100; willfully misapplying money and funds in excess of $100; and with the intent to defraud HUD, issuing and causing the issuing of an obligation and draft and receiving property through a transaction of HUD. That count of the Indictment goes on to state that the Petitioner was an officer, em-

ployee and agent of HUD, a Maintenance Analyst, and that he obtained building supplies and materials and other property from the Newport Housing Authority through an employee of the Housing Authority (William Clark) and that he knew that he was depriving the people of Newport, Kentucky the proper use of federal funds. That conspiracy count goes on to allege various overt acts which deal with specific money and/or business building supplies from various retailers in the Newport-Covington area.

Count two of the Indictment charges the Petitioner with obtaining those same materials and building supplies by extortion, which in this case was allegedly induced under color of official right through and with the consent of William L. Clark, the Director of the Newport Housing Authority.

Counts three through thirteen are similar to the overt acts delineated in Count One of the Indictment in that they deal with each specific alleged transaction. For example, overt act number six deals with tires allegedly purchased from Century Tire Company in the amount of $165.24. Count Twelve of the Indictment again charges the Petitioner with the receipt of those same tires worth $165.24. Each and every one of the Counts, Three through Thirteen can be broken down so that they are listed in the overt acts of the Conspiracy charge. Further, the total amount of the values involved in Counts Three through Thirteen is the amount mentioned in Count Two of the Indictment. Therefore, in effect, the Petitioner was tried for one Conspiracy Count and two Substantive Counts One,

Two and Three through Thirteen involving the exact same facts allegations. During the first trial the Petitioner objected to the duplicitous nature of the Indictment and moved for a directed verdict of acquittal and/or dismissal of the duplicate counts.

What in effect the first trial did, was to give the government three bites at the same apple. Every count of that initial indictment involves the same two people, the Petitioner and William L. Clark. Each count of that Indictment charged cooperation between those two persons in defrauding the United States Government. While different statutes were involved, there is not, any practical difference between those two counts and the facts involved.

As stated in the Statement of Facts, the Petitioner was found not guilty of Count One of the original Indictment, the Conspiracy Count and not guilty of all but Counts Two of the Indictment is the Hobbs Act Count, 18 U.S.C. §1951, which alleged that the Petitioner extorted funds through William L. Clark in a cumulative amount of $2,953.82, a sander worth $99.99, which was allegedly purchased from Sears. Count Seven charged the Petitioner with Corruptly Soliciting and Receiving the item worth $99.99 from William L. Clark in return for his being influenced in his performance of official acts. Petitioner is at a loss to determine any difference whatsoever between the facts necessary for a conviction under Count Two of the Indictment and facts necessary for a conviction under Count Seven of the Indictment. Further, neither of these differ in any way from Count One of the Indict-

ment which again charged the exact same offenses, under the general heading of the Conspiracy between the Petitioner and William L. Clark. Thus, during the first trial, the Government had three shots at the Petitioner and failed to hit him with any of them. On February 8, 1979, the Government decided to reindict the Petitioner on those same charges again. The Superseding Indictment No. 78-39-S charges him with Count One, the "Hobbs Act" Charge that was Count Two of the original Indictment. Count Two of the Superseding Indictment is identical to Count Seven of the original Indictment, involving the $99.99 sander. Count Three of the Indictment is a lesser included offense of Count Two (18 U.S.C. §201(g)), again involving the $99.99 sander. Thus, when the Government could not connect on any of its three shots in the first trial, they again decided to try three more. Prior to the trial on the Superseding Indictment, the Petitioner again protested that he was being tried over and over again for the same offense and a Motion to Dismiss was filed. That Motion was overruled.

Not only was the Petitioner going to be retried on Counts that were identical to the Conspiracy Count for which he was acquitted, he was going to be retried under Count One for items which were contained in Counts Three through Six and Eight through Thirteen of the original Indictment which were included in the Hobbs Act Count of the Indictment. Thus, all the same proof involving those substantive counts would be introduced again and in fact were and were objected to by the Petitioner in a standing objection.

In Petitioner's first trial, he was subjected to double jeopardy in that he was tried under three counts for the exact same crime, that is Obtaining Property from the Housing Authority of Newport. The United States Constitution provides that no person shall be put in jeopardy twice for the same offense. Obviously, that is what occurred during the Petitioner's first trial. Fortunately, at that point, the jury failed to convict him on any of the charges. Upon return of the Superseding Indictment, the doctrine of collateral estoppel comes into play. The jury, when it acquitted the Petitioner of Count One of the initial Indictment, the Conspiracy Count, decided by a general verdict that the Petitioner was not guilty of Obtaining Housing Authority property through William L. Clark. This Court in *Ashe* v. *Swenson,* 397 U. S. 436 (1970) recognized the purpose of the doctrine of collateral estoppel. In that case the Court held "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson, supra,* at p. 443. The ultimate issue of fact to be decided as to the Superseding Indictment was whether the Petitioner obtained property from the Newport Housing Authority through its Director, William L. Clark. That issue had already been determined by the jury when it determined, by general verdict, that the Petitioner did not obtain Housing Authority property illegally through William L. Clark. Thus, under the doctrine of *Ashe* v. *Swenson, supra,* the same issue of ultimate fact could clearly not be

litigated between the same parties more than once. As stated above, that issue was litigated three times in the first trial and another three times in the second trial. Thus, the United States had six opportunities to convict the Petitioner of the same offense and ultimately did so. The Sixth Circuit Court of Appeals has recognized the problem presented in the instant case. In *United States* v. *Austin,* 529 F. 2d 559 (6th Cir. 1976), this Court recognized that

> "The Fifth Amendment comes into play to prohibit double punishments where the substantive and conspiracy counts of an Indictment charges essentially the same offense . . . The test to be applied to determine whether the offenses are separate or essentially congruent is the 'same evidence' test. As the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act."

In the *Austin* case, the Court states further, that

> "Essentially the same evidence in this case was relied upon to prove both the conspiracy count and the substantive offenses. The proof was offered indiscriminately on all three counts and it would be difficult, if not impossible, to weed out any item of evidence that was not pertinent to all counts. The overt acts in the fourth count were all relevant in proving the substantive offenses as well as the conspiracy. Indeed, one overt act specifically alleged in the conspiracy count . . . is also alleged in substantive count three. Further, sub-

> stantive counts one and three allege in effect that same concert of action or agreement as alleged in the conspiracy count and as established by the proof. The objects of the alleged conspiracy would bring about or accomplish violations of the same statute on which counts one and three are based."

As in *Austin,* which cites other similar decisions of the Sixth Circuit in *Freeman* v. *United States,* 146 F. 2d 978 (6th Cir., 1945) and *Krench* v. *United States,* 42 F. 2d 354 (6th Cir., 1930), the same proof was used to prove all of the counts of the present Indictment. Further, all of the counts of the Indictment alleged agreement or concert of action on the part of the Petitioner Beeler and William L. Clark. Thus, under the doctrine of collateral estoppel, when the jury found the Petitioner not guilty under the Conspiracy Count of the Indictment, the ultimate issue of fact was at that point decided in favor of the Petitioner. The United States should not have been given the opportunity to take another bite from the same apple. It is without question that the United States could have found any number of statutes involving the same behavior under which they could have charged and tried the Petitioner. Eventually, the odds are that Petitioner would be convicted of something. This Court cannot permit this to happen under the United States Constitution.

CONCLUSION

The reasons for granting the Writ, as set forth above, show that the Petitioners' constitutional rights have been violated by the United States District Court in that he has been tried successively for the same offenses. Petitioner respectfully requests this Court to grant Certiorari to correct the injustice done the Petitioner and reverse his conviction.

Respectfully submitted,

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APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-5426

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

BEVERLY LEROY BEELER - - *Defendant-Appellant*

ORDER—Filed May 2, 1980

BEFORE: EDWARDS, Chief Circuit Judge, and KENNEDY and JONES, Circuit Judges

Defendant appeals his conviction on March 30, 1970, of one count each of 18 U.S.C. §1951 and 18 U.S.C. §201(c)1. The first count involved obstruction, by extortion, of articles in commerce. The second count involves bribery of a public official. The defendant was found innocent of a third count of conspiring to defraud the United States.

In a trial in January, 1979, the defendant was tried on a thirteen count indictment which had been returned by the grand jury on October 11, 1978. In his first trial the jury found the defendant not guilty of ten counts. These counts involved one count of 18 U.S.C. §371, conspiracy to defraud the United States, and nine counts of 18 U.S.C. §201(c)1, of bribery of a public official. The court dismissed an additional count of this indictment with respect to 18 U.S.C. §201(c)1. The jury was unable to reach a verdict on the other two counts. The grand jury returned a super-

seding indictment which included two counts substantially like the two counts upon which the jury could not reach a verdict in the January, 1979 trial, and a third count which alleges a violation of 18 U.S.C. §201(d), soliciting and receiving property as a public official.

Plaintiff presented motions at the first trial seeking to quash part of the thirteen count indictment as violative of the Double Jeopardy Clause of the Fifth Amendment. The district court denied this motion and a subsequent motion to quash the second indictment for similar reasons. The defendant was sentenced to two concurrent terms of eighteen months for his conviction on March 30, 1979. From this conviction defendant appeals. The district court correctly denied these motions to dismiss the superseding indictment. Accordingly, the district court's judgment is affirmed.

We also hold that the claim that the government proceeded against the defendant on the conspiracy charge and the substantive counts on identical facts in violation of the Double Jeopardy Clause is without merit. *Blockburger* v. *United States,* 284 U. S. 299 (1932); *Brown* v. *Ohio,* 432 U. S. 161 (1976); *Ianelli* v. *United States,* 420 U. S. 770 (1974); *United States* v. *Larry,* 536 F. 2d 1149 (6th Cir. 1976).

Finally, there was sufficient evidence to support this conviction. In reviewing the conviction of a federal crime in federal district court, the court must determine that there was sufficient evidence to convince a rational jury beyond a reasonable doubt that the defendant was guilty. *Jackson* v. *Virginia,* U. S. (1979) (state prisoner seeking habeas corpus). In this case there is more than sufficient evidence to convince this Court that a rational jury could have found the defendant guilty beyond a reasonable doubt. The defendant admitted to several of the allegations of the government. The chief witness against the defendant was given immunity but the jury need not totally discount

the testimony of a witness who has been granted immunity by the government. *United States* v. *Ailstock*, 546 F. 2d 1235 (6th Cir. 1976). In addition, there was substantial corroboration of the testimony of the chief government witness.

Accordingly, the district court's judgment is affirmed.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman

Clerk

APPENDIX A-2

STATUTES INVOLVED

18 U.S.C. §1951

Interfering with commerce by threats of violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce

between points within the same State through any place outside such State; and all other commerce over which the United States has Jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. §201(c)(1)

Bribery of public officials and witnesses

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act.

18 U.S.C. §201(g)

Bribery of public officials and witnesses

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him.

18 U.S.C. §371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commissioner of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.